

MasterCard International
888 Seventh Avenue
New York, NY 10106
212 649-5301

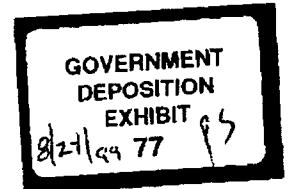
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June 18, 1992

Robert E. Norton, Jr.
Senior Vice President
General Counsel & Secretary

Ms. Constance Robinson
Chief
Communications and Finance Section
Antitrust Division
U.S. Department of Justice
555 4 Street, N.W., Room 8104
Washington, D.C. 20001



Re: MasterCard and Visa Board Representation

Dear Ms. Robinson:

In February of this year, Stanley Robinson, of Kaye, Scholer, Fierman, Hays & Handler, and I visited with you regarding the possibility of MasterCard allowing an employee from a member bank to serve on the MasterCard Board of Directors ("Board") even though another employee of the same member is serving as a director of Visa. We discussed the proposal in the context of Section 8 of the Clayton Act. In those discussions, we explained our increasing concern that MasterCard would lose Board representation from officers of important members because of the growing consolidation in the banking industry. Recognizing that our concerns were still hypothetical, we promised to approach you again when, and if, we had a concrete example of that consolidation resulting in a loss of MasterCard Board representation. We now have several.

Background

MasterCard is, as you know, a not-for-profit membership corporation. Its role is to provide network payment services to its members which, in turn, incorporate the MasterCard component into broader card and acquirer services which they offer to consumers and merchants. The MasterCard Board consists of 28 directors and it is elected by all members, based on a system of weighted voting tied to transaction volumes.¹ Nearly all the MasterCard members are also members of Visa, except in Canada, Germany and Brazil. At the last election, approximately 90% to 95% of the

¹ We are referring here to the Board of Directors, as it was structured when we discussed the matter in February. It was then the only Board of Directors MasterCard had; it is now being redesignated in essence as the "global" MasterCard Board and it will have oversight and review responsibility for a new "U.S." board elected entirely by U.S. members. Virtually 100% of the votes cast for election of directors to the U.S. board will be by members which are also Visa issuers.

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votes cast for MasterCard directors were cast by members who were Visa issuers.

To be eligible for election as a director, an individual must be an employee of a member. At the same time, as a director, he/she is a fiduciary for all the members. Some directors are employed by large issuers or acquirers and some by small issuers.

MasterCard is very anxious to have major issuers well represented on its Board in order to maintain its status as a major credit card system and to encourage its members to utilize MasterCard offerings. From MasterCard's perspective, a director serves as a sort of MasterCard ambassador to the employee's own institution - someone who is familiar with MasterCard and willing to explain, and perhaps even advocate, MasterCard's positions and proposals to his/her own management. This helps explain why MasterCard is so anxious to retain employees from major card issuers on the Board.

Recent Developments

Since our meeting with you in February, MasterCard has had three directors resign their Board seats as a result of (i) banking consolidations and (ii) the member's concern that Section 8 might apply even if different officials from the same member bank were to sit on both MasterCard and Visa boards. In the first instance, Citizens and Southern was merged into NCNB, which had a long-serving Visa board member and the merged institution (NationsBank) decided not to let its former MasterCard Board member continue to hold his seat. In April, the director from Manufacturers Hanover, who had been with MasterCard for sixteen years, notified MasterCard that he would be leaving the Board because of the Manufacturers Hanover merger with Chemical Bank. The resulting entity, Chemical, decided to let its employee serving as a director on the Visa board retain his seat, thus maintaining longstanding Chemical Bank representation on the Visa board. More recently, it has been announced that Bank One, Columbus, has acquired Valley National Bank. An officer of Valley National sits on the MasterCard Board, while Bank One has long had one of its officers on the Visa board. It is anticipated that we will lose this representation as well.

The effect then is that MasterCard has lost, and could continue to lose, major member representation on our Board with three negative impacts. First, MasterCard loses the input of large issuing members at MasterCard Board deliberations of key issues affecting the business. Second, MasterCard will lose the services of an "ambassador" in the upper levels of management of key major members. Third, MasterCard will be increasingly perceived as the association of the non-banks. Of the top seven issuers, six are traditional banks which are members of the two associations. Only two of these top issuers have employees

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serving on the MasterCard Board and one of these is a new non-bank entity.

We are concerned about this situation. You ought to be, too, we would respectfully suggest. It would seem to be in the best interest of the competitive policies espoused and enforced by the Justice Department that MasterCard continue as a second strong card association to compete with the influence of Visa. However, with continued consolidation and loss of large issuer Board representation, the opposite is most likely to occur and MasterCard may eventually be reduced in stature where there is no longer a perceived need to have two associations.

Our Unique Situation

Attached is a copy of the Nilson Report which reports the top fifty issuers in the bankcard business by volume and number of cards. The chart makes clear that the clear majority of the voting rights in each corporation, as measured by the volumes of these organizations, lies with the same fifty members. We recognize that there are different degrees of ownership in each organization, nevertheless, the same institutions have an ownership interest and the aggregate votes represented exceed 80% of the total votes outstanding in each association.

Furthermore, the members, which necessarily underwrite the costs, view the associations as complementary and are displeased when one attempts to enhance itself at the expense of the other. In fact, MasterCard recently ran an ad campaign that stated MasterCard had equal acceptance with Visa. This ad had the unintended effect of reducing Visa's superior quality acceptance perception among consumers and our members objected to this ad approach, requesting that MasterCard adopt another advertising approach which did not disadvantage Visa.

This situation, generally called "duality" in the credit card business, is the result of antitrust history with which the Department is all too familiar. Visa's original rules requiring card issuers that could only be members of only one system were (i) challenged by a dual issuer in Worthen v. National BankAmericard, 485 F. 2d 119 (8th Cir. 1973), and (ii) denied a Business Review clearance by the Justice Department in 1975. In Worthen, the Eighth Circuit set the case down for full Rule of Reason trial, while the Antitrust Division declined the Business Review on the ground that it did not have sufficient information (on inter-system competition versus card issuer/acquirer competition) to make a decision. See Baker and Brandel, The Law of Electronic Fund Transfer Systems, ¶ 23.02 ("The Worthen Challenge and the Duality Debate"). "At this point, an understandably disappointed [Visa] completely reversed its position and removed all restrictions on dual membership. Almost immediately, banks rushed to join both systems at an astounding rate ... [and] these two national joint ventures now have largely overlapping memberships." Ibid. The

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Antitrust Division did nothing to prevent duality from occurring.²

A Proposal

Recognizing the unique situation under duality, the Justice Department could allow MasterCard and Visa members to elect different executives from the same organization to serve on their boards.

Trying to apply Section 8 to our situation in an expansive and unprecedented manner would seem counterproductive and unwise. As you know, Section 8 is directed primarily at the individual who sits on the boards of competing commercial corporations. It does not explicitly address the situation where two individuals who are employed by the same enterprise each sit on boards of different competing commercial corporations.³ Section 8 has even less relevance in the context of the membership service corporations which serve essentially the same member group with complementary offerings.

MasterCard and Visa simply do not "compete" in any conventional business sense. It is, in fact, their members, and not MasterCard and Visa, which issue the cards and sign up merchants. It is true MasterCard and Visa "compete" to maintain the value of their respective trademarks, and the goodwill associated with them. And, they "compete" for the hearts and minds of members but it is those members which compete with each other in the marketplace and price the services to merchants and cardholders. (Recognition of this reality apparently influenced the Department's position in rejecting the 1974 Visa Business Review request after a year's review.) In view of this fact, it seems even more inappropriate to not allow separate individuals from the same entity to serve on each board.

² By contrast, the U.S. courts declined to entertain antitrust challenges to a network exclusivity rule in Canada, National Bank of Canada v. Interbank Card Assn., 666 F. 2d 6 (2nd Cir. 1981); and the Canadian antitrust authorities did not object to it. Thus Canada, along with Brazil and Germany, are the principal exceptions to worldwide duality which came to pass after the Department's 1975 Business Review decision.

³ The Department has at times expressed concern on these issues and brought at least one case based on a "deputation" theory. See U.S. v. Cleveland Trust Co., 392 F. Supp. 699, 711-713 (N.D. Ohio 1974) (rejecting the Government's motion for summary judgment). The Department itself has since recognized that the "deputation" issue "is normally a factual issue" turning on various considerations, including the relationship of the third party entity to the two competing corporations and whether the third party had aggressively sought the representation. See Business Review Letter dated February 26, 1981 from Sanford M. Litvack to the counsel for the United Automobile Workers Union, reprinted in 5 Trade Reg. Rep. ¶ 50,4226 (1981) (declining to pass on the question of whether the proposed service of different UAW officials on the boards of directors of competing automobile companies would violate Section 8).

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This situation raises a broad and interesting issue under Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), where the Supreme Court held that the wholly-owned subsidiaries of a common parent were not legally capable of conspiring. The Court left open the case where lesser levels of common ownership and control were present. 467 U.S. at 767.⁴ In the case of MasterCard and Visa, the common membership is virtually 100% within the United States (as is reflected in the MasterCard system of weighted voting); and that common control is by the "customers" of these associations. On a worldwide basis, the common membership and control is somewhat lower, principally because of the situations in Canada, Germany and Brazil, but it is still over 90%. We believe that, given this practical reality and the pragmatic policy articulated in Copperweld, the Department should not seek to assert that Visa and MasterCard meet the "agreement" requirement for Section 8, especially within the United States.

The Justice Department has recognized the uniqueness of MasterCard and Visa since duality became an accomplished fact in the late 1970s. The Department has informally approved the issuance of joint security bulletins to merchants, the creation of common rules for MasterCard and Visa and the joint Entree POS Program, and even tentatively acknowledging the possibility of a common backroom for the two associations' networks in the early '80s. These non-objections evidence the Justice Department's understanding that MasterCard and Visa are in fact unique from a competitive perspective. The request made here should, in our view, receive similar treatment for the same reasons.

Conclusion

To summarize, we question whether the concerns of Section 8 of the Clayton Act are really present with regard to MasterCard and Visa. First, there is a question whether MasterCard and Visa can truly be characterized as "competitors", given

⁴ In Copperweld, the Supreme Court noted that the actions of a parent and its wholly-owned subsidiary reflect a "complete unity of interest" because, with or without formal agreement, the subsidiary always acts for the benefit of the parent. Thus, "there is no sudden joining of economic resources that had previously served different interests", 467 U.S. at 771, and therefore no basis for asserting a conspiracy. Some post-Copperweld decisions by lower courts have relied on this rationale to hold that corporations under the common control of the same individuals or firms are incapable of conspiring. See Century Oil Tool, Inc. v. Production Specialists, Inc., 737 F.2d 1433 (5th Cir. 1984), cert. denied, 469 U.S. 1160 (1985) (two corporations were each owned by three persons, two of whom owned 30 percent of each corporation and one of whom owned the remaining 40 percent); and Gucci v. Gucci Shops, Inc., 651 F. Supp. 194 (S.D.N.Y. 1986) (two corporations were owned by the same individuals, one of whom had effective control by virtue of a 50 percent interest in both). Contra: Fishman v. Wirtz, 807 F.2d 520, 541-42 n. 19 (7th Cir. 1986) (common but not identical controlling shareholders). Judge Easterbrook's dissenting opinion argued that the fact "[t]hat the overlap of investment is not complete is irrelevant; 'control' is what matters for purposes of Copperweld." *Id.* at 576-77.

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their almost total common ownership in the United States and the complementary, rather than competitive, manner with which members treat them as described above. Second, it is MasterCard itself (rather than the employing institutions) which is pressing to be allowed to have overlapping employees elected to its Board. Third, as membership associations, when one Board acts with respect to a matter, the results of those actions are disseminated to the members which are members in both organizations. As a result, each of the associations is a fishbowl and officers and board members are aware of what the other is doing, much more so than in the normal corporate environment. This is the nature of a membership organization in which dissemination of such information is the norm, if not a necessity. Therefore, placing different representatives from one member on each board certainly will not impact the ease with which each association becomes aware of the other's activities nor impact the manner in which the members deal with the associations in the future.

You are well aware of the consolidation in the banking marketplace which is seriously injuring MasterCard, the smaller association, in both image and Board representation of its members. Given the unique nature of the roles played by MasterCard and Visa, under duality, conventional Section 8 concerns do not exist and this is not the place to consider some novel combination of "competition" among membership services corporations and "deputization" as an extension of the statute. Accordingly, we would ask that the Department not prevent MasterCard and Visa from allowing their members to elect different directors from the same organization on both associations' boards, if the members wish to do so.

We would very much appreciate an opportunity to talk with you further about this matter. I am going to be out of the country at a Board meeting during the next week and, therefore, I have asked Don Baker, of Jones, Day, Reavis & Pogue, to call you to try to set up a meeting on our behalf.

Sincerely,



Robert E. Norton, Jr.
Senior Vice President,
General Counsel & Secretary

cc: Donald I. Baker, Esq.
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005

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TOP 50 BANK CREDIT-CARD ISSUERS IN THE U.S. - 1991

1991 Rank	Issuer	Ranking '90/'89	Issued From	Active Accounts	Total Accounts	Total Cards	Charge Vol. (\$Bil.)	Out-standings (\$Bil.)	Master-Card Cards	Visa Cards
1.	Citibank	1/1	Sioux Falls, S.D.	17,927,250	21,415,920	30,089,400	\$42.48	\$34.15	12,411,900	17,677.5
2.	Chase Manhattan	2/2	Wilmington, Del.	7,200,000	10,000,000	13,600,000	\$13.11	\$10.31	3,600,000	10,000,000
3.	AT&T Universal (NB)	5/-	Columbus, Ga.	6,250,000	7,600,000	12,000,000	\$13.21	\$3.80	8,000,000	4,000,000
4.	First Chicago	3/4	Wilmington, Del.	4,608,717	7,051,605	10,255,264	\$14.08	\$7.03	2,424,246	7,831,018
5.	Bank of America	4/3	Phoenix, Ariz.	4,132,500	4,219,000	7,478,400	\$9.89	\$6.22	1,571,000	5,907,300
6.	MBNA America (NB)	6/5	Newark, Del.	3,784,000	5,274,000	7,014,000	\$12.40	\$8.22	4,528,000	2,486,000
7.	Chemical Banking Corp.	23/10	Hicksville, N.Y.	3,109,808	4,212,051	6,640,824	\$6.54	\$5.88	3,720,232	2,920,592
8.	NationsBank	13/13	Dover, Del.	2,486,974	3,815,390	3,838,041	\$6.80	\$3.98	1,141,074	2,696,967
9.	Household Bank (NB)	10/9	Salinas, Calif.	2,465,485	4,096,346	5,734,884	\$3.12	\$3.81	3,509,184	2,225,700
10.	Wells Fargo Bank	7/6	San Francisco, Calif.	2,240,000	3,083,000	3,950,000	\$4.97	\$3.06	2,086,000	1,864,000
11.	Bank of New York	8/7	Newark, Del.	1,978,000	3,072,000	4,456,000	\$3.81	\$3.88	3,377,000	1,079,000
12.	Norwest Bank	16/20	W. Des Moines, Iowa	1,725,000	2,050,000	2,650,000	\$2.86	\$1.86	1,456,000	1,194,000
13.	Bank One, Columbus	14/14	Columbus, Ohio	1,716,169	3,161,822	4,521,298	\$3.71	\$2.60	835,625	3,685,673
14.	Associates National (NB)	11/11	Pleasanton, Calif.	1,703,000	2,398,000	3,340,900	\$2.30	\$2.67	1,740,300	1,600,600
15.	Monogram Bank (NB)	12/17	Blue Ash, Ohio	1,573,182	2,120,000	2,997,425	\$1.62	\$1.32	929,202	2,068,223
16.	First USA (NB)	15/12	Wilmington, Del.	1,544,000	2,256,000	2,874,000	\$2.86	\$2.22	886,000	1,988,000
17.	Colonial National (NB)	22/25	Wilmington, Del.	1,468,989	2,014,612	3,062,210	\$3.38	\$2.02	1,490,164	1,572,046
18.	USAA Federal Savings (NB)	20/21	San Antonio, Tex.	1,420,000	1,734,000	2,775,000	\$4.76	\$2.05	2,225,000	550,000
19.	First Nat'l of Omaha	19/19	Omaha, Neb.	1,380,000	2,300,000	3,910,000	\$1.76	\$1.38	1,564,000	2,346,000
20.	Signet Bank	21/16	Glen Allen, Va.	1,276,546	1,539,183	1,876,583	\$1.96	\$1.77	1,260,088	616,495
21.	Security Pacific Nat'l	18/15	Phoenix, Ariz.	1,147,753	1,546,168	2,396,560	\$3.42	\$1.82	934,658	1,461,902
22.	Wachovia Bank	27/23	New Castle, Del.	1,092,000	1,672,000	2,484,000	\$2.15	\$1.66	629,000	1,855,000
23.	Seafirst Bank	24/22	Spokane, Wash.	1,048,000	1,259,000	1,910,000	\$3.10	\$1.49	1,300,000	610,000
24.	Mellon Bank	34/34	Wilmington, Del.	965,416	1,582,304	2,439,901	\$1.89	\$1.22	730,839	1,709,062
25.	First Union National	40/41	Charlotte, N.C.	925,010	1,861,920	2,349,043	\$1.92	\$1.63	1,356,518	992,525
26.	First Bank System	32/31	Sioux Falls, S. Dak.	890,800	1,256,300	1,844,500	\$2.41	\$1.48	387,500	1,457.0
27.	First Deposit Bank (NB)	28/27	Tilton, N.H.	867,334	976,780	1,416,331	\$0.73	\$2.14	167,975	1,248,356
28.	Marine Midland Bank	26/18	Buffalo, N.Y.	860,427	1,349,721	2,747,336	\$2.50	\$1.27	1,612,686	1,134,650
29.	Rocky Mountain BankCard	29/26	Denver, Colo.	779,130	1,014,177	1,290,985	\$1.95	\$0.77	240,449	1,050,536
30.	First Wisconsin	33/33	Milwaukee, Wis.	719,400	1,199,000	1,882,430	\$1.70	\$0.68	1,223,570	658,860
31.	PNC Financial	30/30	Wilmington, Del.	699,000	870,000	1,280,000	\$1.72	\$0.79	478,400	801,600
32.	Barnett Bank	31/32	Jacksonville, Fla.	656,585	894,811	1,217,979	\$1.43	\$1.00	349,131	878,848
33.	First Interstate of Calif.	36/35	Los Angeles, Calif.	567,900	792,774	892,500	\$1.39	\$0.75	517,650	374,850
34.	CoreStates Bank	25/24	Wilmington, Del.	555,709	949,517	1,379,276	\$1.95	\$0.95	501,846	877,431
35.	Harris Trust & Savings	35/37	Buffalo Grove, Ill.	520,000	750,000	1,350,000	\$1.20	\$0.70	730,000	620,000
36.	Security Bank & Trust	41/39	Southgate, Mich.	486,357	807,416	2,320,668	\$1.27	\$0.55	903,078	1,417,590
37.	Chey Chase FSB (NB)	37/29	Chey Chase, Md.	479,000	619,000	953,260	\$1.37	\$0.90	352,706	600,554
38.	First Omni Bank	42/42	Millsboro, Del.	474,491	751,687	877,995	\$0.89	\$0.73	334,077	543,918
39.	Society National	39/60	Cleveland, Ohio	463,866	666,640	864,136	\$1.09	\$0.62	507,592	356,544
40.	Sun Bank	43/45	Orlando, Fla.	422,615	498,050	716,000	\$0.79	\$0.55	472,150	243,950
41.	U.S. Bank	49/48	Portland, Oreg.	383,034	526,727	772,831	\$1.07	\$0.50	46,370	726,461
42.	Bank One, Lafayette	51/58	Lafayette, Ind.	377,904	503,089	734,166	\$0.65	\$0.35	174,018	560,148
43.	BancOhio National	44/46	Columbus, Ohio	376,804	799,040	1,198,561	\$0.56	\$0.55	719,137	479,424
44.	First Tennessee	53/52	Memphis, Tenn.	373,000	622,000	1,057,400	\$0.59	\$0.40	347,592	709,807
45.	Valley National	57/57	Phoenix, Ariz.	368,000	489,000	765,000	\$0.86	\$0.49	517,000	248,000
46.	Ameritrust	59/53	Cleveland, Ohio	362,907	486,140	597,111	\$0.68	\$0.48	61,914	535,197
47.	JCPenney National (NB)	48/44	Harrington, Del.	354,679	540,798	575,317	\$0.42	\$0.56	264,646	310,671
48.	Town North National (CU)	58/62	Farmers Branch, Tex.	349,630	465,863	685,529	\$0.64	\$0.32	636,337	49,192
49.	Mercantile Bank	46/43	Alton, Ill.	349,000	488,000	683,000	\$0.68	\$0.47	370,000	313,000
50.	INB National	47/40	Indianapolis, Ind.	345,637	500,028	835,046	\$0.71	\$0.39	155,011	680,035
TOTALS for Top 50 Issuers 1991				88,201,008	120,150,879	173,591,090	\$197.35	\$134.42	75,776,865	97,814.7
TOTALS for Top 50 Issuers 1990				80,335,201	108,167,905	160,461,498	\$173.34	\$119.22	67,824,183	92,638,035
CHANGE 1991 vs. 1990				+9.79%	+11.08%	+8.18%	+13.85%	+13.70%	+11.73%	+5.59%

NOTE: NB = nonbank, CU = credit union. Figures are Visa and MasterCard credit cards only - no debit or private-label cards or check lines of credit.

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